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BEFORE THE ARIZONA CORPORATION COMMISSION

MIKE GLEASON
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WILLIAM A. MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
KRISTIN K. MAYES
Commissioner
GARY PIERCE
Commissioner

Arizona Corporation Commission

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IN THE MATTER OF THE APPLICATION OF
SEMPRA ENERGY SOLUTIONS FOR A
CERTIFICATE OF CONVENIENCE AND
NECESSITY FOR COMPETITIVE RETAIL
ELECTRIC SERVICE.

DOCKET NO. E-03964A-06-0168

**NEW WEST ENERGY
CORPORATION'S REPLY IN
SUPPORT OF ITS MOTION TO
DISMISS**

Intervenor, New West Energy Corporation ("New West Energy") submits its
reply in support of its Motion to Dismiss Sempra Energy Solutions' ("Sempra")
application for a Certificate of Convenience & Necessity.

ARGUMENT

Intervenors ACC Staff, RUCO and AIC all support New West Energy's Motion to
Dismiss. This reply therefore addresses only the arguments made by Sempra and
Air Liquide Industrial.

Reply to the Response of Sempra Energy Solutions

In its response, Sempra makes five arguments.

Argument 1.

Sempra first argues that if the motion does not clearly fall within one of the
motions permitted by Rule 12 of the Rules of Civil Procedure for the Superior Court,
that the Commission may not consider it. This argument follows Sempra's recurring
theme, first seen in Sempra's Motion to Strike. The theme is that the Commission is

1 without authority to consider anything in the docket, other than the qualifications of
2 the applicant.¹

3 While New West Energy could have shoehorned this motion into on of the
4 threshold motions recognized by the Superior Court (e.g. the matter is not ripe for
5 adjudication), strict compliance with the Rules of Civil Procedure is not required in
6 Commission administrative proceedings. This is made clear in Title 40:

7 40-243. Conduct of hearings and investigations; representation by corporate
8 officer or employee; arbitration

9 A. All hearings and investigations before the commission or a commissioner
10 shall be governed by this article, and by rules of practice and procedure
11 adopted by the commission. Neither the commission nor a commissioner
12 shall be bound by technical rules of evidence, and no informality in any
proceeding or in the manner of taking testimony before the commission or
a commissioner shall invalidate any order, decision, rule or regulation
made, approved or confirmed by the commission.

13 While the Commission's rules provide that motions "in so far as practical"
14 follow the Rules of Civil Procedure (A.C.C. R14-2-106(K)), this is a case where the
15 Commission's express rules go beyond the Rules of Civil Procedure. Specifically, the
16 Commission's Rules confirm the Commission's general *legislative* authority to dismiss
17 an application at any time:

18 R14-3-109. Hearings, prehearings, conduct of hearings, procedure, evidence,
19 subpoenas, briefs, arguments, official notice and rulings

20 . . .

21 C. Dismissal of proceeding. The Commission may dismiss the application or
22 complaint with or without prejudice or may recess said hearing for a further
23 period to be set by the Commission. A single Commissioner or a Hearing
Officer may adjourn or recess a hearing at any time to submit a
recommendation to the Commission to dismiss the proceeding, or may recess
said hearing for a further period to be set by the Commission.

25 ¹ The general argument of Sempra that the Commission may not consider the broad public
26 interest in this proceeding was rejected by the Administrative Law Judge Wolfe in her
27 Procedural Order dated December 20, 2007.

1 This rule reflects the fact the Commission's scope of authority is broader than
2 a court's, and that the Commission has a broad range of legislative discretion, in
3 additional to its quasi judicial authority.² If the Commission has the inherent
4 authority to dismiss an application at any time, then it only follows that a party may
5 request at any time that the Commission exercise this jurisdiction³.

6 New West Energy's argument has a practical side, which goes to the core of
7 this proceeding and the Commission's legislative authority. Clearly, the underlying
8 pieces are not in place to hear this application. The Commission in its Track A order
9 halted the deregulation process that it had contemplated by waiving divestiture
10 requirements, the Commission has found that the wholesale markets needed to
11 support deregulation are not adequate, the Courts have invalidated many of the
12 competition rules, initiatives to explore issues relating to deregulation are ongoing,
13 and the Commissioners themselves have raised fundamental questions about the
14 process of deregulation contemplated in Arizona, following failures of similar
15 structures in other states. In this proceeding, the Commission Staff, RUCO and AIC
16 (in addition to New West Energy) have recognized and argued that this application is
17 neither the time nor the place to consider the many complex issues surrounding
18 deregulation.

19 Sempra's strategy is to ignore the elephant in the room. It unsuccessfully
20 sought to strike all of the testimony that raised the fundamental issues. Now, it
21 argues that the Commission cannot consider public interest issues, because it is
22

23 ² Arizona Constitution Article XV, Section 3; A.R.S. § 40-202(A).

24 ³ We point out the general theme of the Commission's rules is to allow a liberal construction
to further the jurisdiction and interest of the Commission:

25 A.C.C. R14-3-101(B). Liberal construction -- waiver. These rules shall be liberally
26 construed to secure just and speedy determination of all matters presented to the
Commission. If good cause appears, the Commission or the presiding officer may
27 waive application of these rules when not in conflict with law and does not affect the
substantial interests of the parties.

1 bound by strict confines of Superior Court Rules. It is undisputable that the
2 Commission has the jurisdiction to consider whether the necessary backdrop is in
3 place to hear this application. And if it the Commission is not comfortable that the
4 backdrop is in place in a way that will protect the public interest, then the
5 Commission can save itself and all of the parties the considerable resources of going
6 through an empty hearing process.

7 Sempra makes the argument that New West Energy is trying to do the same
8 thing that Sempra sought unsuccessfully in its motion to strike: sidestep cross
9 examination and a hearing on the public interest issues. But, there is a big
10 difference. Sempra sought to keep out evidence. New West Energy is saying that
11 there are so many issues, that it makes no sense to explore them in the limited
12 context of this particular CC&N hearing. While New West Energy mentions the
13 testimony in this case as indicative of the many issues, the motion is in no sense
14 based on this testimony, and cross examination of the witnesses is not necessary to
15 rule on New West Energy's motion.

16 **Argument 2.**

17 Sempra's second argument is that the Motion to Dismiss is not timely. The
18 fact that the parties are briefing and arguing the issues under the time frames of the
19 procedural order itself dispels that notion. Furthermore, as the Commission has the
20 jurisdiction in the public interest to dismiss an application at any time, even during a
21 hearing, it naturally follows that a party can at any time ask the Commission to
22 exercise that jurisdiction. As stated by the court in *Turner Ranches Water and*
23 *Sanitation Co. v Arizona Corp.* Com'n 195 Ariz. 574, 991 P.2d 804, as amended
24 (App. Div. 1 1999), the Commission is not precluded from addressing relevant
25 factors in a proceeding simply because they are not raised in the first instance.
26
27

1 This argument also has a practical side. This case has been a process of
2 developing and refining the issues. In fact it was re-noticed to the public last July.
3 It was only in December that Administrative Law Judge Wolfe clarified that this
4 proceeding would include the consideration of the broad underlying public interest
5 issues that are the foundation of the application. New West Energy's motion
6 naturally and logically was brought at a timely point following this ruling.

7 New West Energy points to the provisions of A.R.S. § 40-243 (allowing
8 informality in Commission proceedings) and A.C.C. R14-2-101(B) (rules construed
9 liberally to secure a just determination). New West Energy also points out that this
10 motion is in no sense contrary to any procedural order issued in this case. The
11 arguments made by Sempra, that a motion cannot be made before further
12 "pleadings" does not logically or legally apply to an administrative application
13 proceeding.

14 **Argument 3.**

15 Sempra's third argument is that at least two of the sets of questions posed by
16 Commissioners mean nothing, because those two Commissioners are no longer in
17 office, and that in any event all of the questions were answered and resolved.
18 Sempra also argues that the questions and other authorities are old, and that the
19 Commission has the jurisdiction to proceed.

20 With respect to the first point, Arizona law is clear that the Commission acts as
21 a body, not individuals. This of course is necessary to retain the continuity of an
22 agency controlled by elected officials. As stated by A.R.S. §40-102(C):

23 C. The act of a majority of the commissioners when in session as a board shall
24 be the act of the commission. Any investigation, inquiry or hearing may be
25 undertaken or held by or before any commissioner designated by the
26 commission for the purpose, and every finding, order or decision made by a
27 commissioner so designated, when approved and confirmed by the
commission and ordered filed in its office, shall be the finding, order or
decision of the commission.

1 Sempra would argue though that these questions were not posed by the
2 Commission, but just by the individuals for their own personal interest. This
3 contention is dispelled, however, by the fact that each of the four sets of questions
4 was recognized and accepted by the Commission as a whole. Specifically in a
5 procedural order issued on January 22, 2002 in Docket E00000A-02-0051 (the
6 Generic Proceedings Regarding Restructuring Issues) (attached as Exhibit "A"), the
7 Commission as a whole recognized the first set of questions posed by Commissioner
8 Mundell, invited other Commissioners to submit additional questions, and set forth a
9 process for considering the issues raised by the questions. In the same procedural
10 order the Commission opened a generic docket to consider "developing issues in
11 electric restructuring".

12 The second point, that all of the questions have been resolved, is simply
13 untrue. A quick perusal of the questions dispels that notion. For example:

14 How can the Commission protect Arizona customers from the risks of
15 competition while promoting competition? (Mundell 01/14/02)

16 How does the current Commission regulate promote or deter the ability of (1)
17 renewables, (2) distributed generation, and (3) energy efficiency and demand
side management compete with traditional generation resources? (Mundell
01/14/02)

18 Will the transmission system be adequate prospectively (e.g., in the next 5,
19 10, 15, 20 years) to deliver power from new generation plants? (Mundell
01/14/02)

20 Is there anything the Commission should do to continue to avoid California's
21 retail electric competition experience? (Mundell 01/14/02)

22 In a competitive electric market model, what incentives exist for the expanded
23 use of renewable energies? (Spitzer 1/22/02)

24 Under the competitive electric market model, what incentives exist to build
25 newer plants that are less damaging to the environment to replace older,
dirtier plants? (Spitzer 1/22/02)

26 [W]hat assurances do we have that volatility in the market (for both natural
27 gas and electricity) will not result in unstable or inflated rates? (Irvin
02/07/02)

1 What are the real benefits to residential consumers and small businesses in
2 retail competition, other than consumer choice (Irvin 02/07/02)⁴

3 There are many more questions. And, even the questions about market power and
4 divestiture are far from being resolved.

5 The third point is that the questions and issues were raised several years ago.
6 This is true. This does not make them any less valid. Probably the Commission has
7 put the issues on hold, because of its overriding concern that the wholesale markets
8 were not developed to an extent to properly support retail deregulation.

9 Finally, Sempra argues that even though some of the Competition Rules were
10 invalidated by the court in *Phelps Dodge*, the Commission still has the jurisdiction to
11 move forward. This argument misses the point. The point is that though the
12 Commission may have the underlying jurisdiction, from a public policy perspective, it
13 is not wise to go forward with a new CC&N application, without first building a solid
14 basis on which to proceed. A solid basis to proceed would logically include
15 comprehensive rules, as originally envisioned by the Commission.

16 **Argument 4.**

17 Sempra's forth argument turns to a personal attack against New West Energy
18 and its motives. Sempra argues that New West Energy is not prepared for
19 deregulation and is therefore trying to delay. Sempra also argues that New West
20 Energy is simply the "stalking horse" of Salt River Project.

21 Taking the second point first, it has never been a secret that New West Energy
22 is owned by Salt River Project and that its incorporators and directors are strongly
23 affiliated with SRP (in fact the directors are the elected officials of SRP). This is no
24 different from other utilities that formed entities to engage in retail competition,
25

26 ⁴ Commissioner Irvin states in his letter that he has long since held the view that Arizona's
27 move toward competitive markets will necessitate revisiting the Rules on a periodic basis.

1 including Sempra. But, that does not mean that New West Energy does not have a
2 legitimate interest here. Like every entity in the industry New West Energy is
3 concerned that changes be made carefully, considering among other things the
4 lessons of history. Every industry participant, including ESPs, and including SRP, will
5 be at risk if the Commission proceeds along the course suggested by Sempra.

6 Nor does the fact that SRP withdrew its intervention have any relevance. SRP
7 was quite clear in its withdrawal that its interests would be represented by New West
8 Energy, a Corporation Commission jurisdictional entity.

9 The other point really does not merit a response. Until 2001 New West Energy
10 was an active participant in retail electricity markets (mostly in California). When
11 New West Energy made the decision to withdraw from that business, it naturally
12 engaged in a winding down process. Today, there is no need to maintain a force of
13 employees. This current circumstance has no relation to New West Energy's
14 concerns in this proceeding.

15 **Argument 5.**

16 Finally Sempra argues that it should have the opportunity to argue the motion
17 to the full Commission. It seems that this is already contemplated by Commission
18 Rule R14-2-109(C):

19 A single Commissioner or a Hearing Officer may adjourn or recess a hearing at
20 any time to submit a recommendation to the Commission to dismiss the
21 proceeding, or may recess said hearing for a further period to be set by the
Commission.

22 **Reply to the Response of Air Liquide Industrial**

23 Air Liquide makes a single argument (in addition to adopting the Sempra
24 arguments). The argument is that the process for granting competitive CC&N's is
25 already in place, and that it is the burden of those choosing to challenge the process
26 to do so in the context of an evidentiary hearing. Air Liquide provides no authority
27

1 for this assertion, other than quoting a statement by Administrative Law Judge Wolfe
2 in the procedural order issued in the different context of denying the motion to
3 strike.

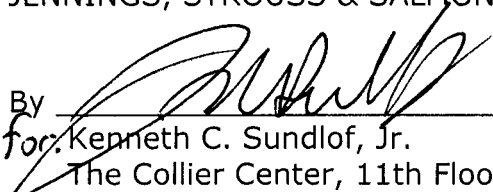
4 New West Energy cannot find support for this proposition. Basically Air
5 Liquide argues that by simply filing an application, Sempra can force the Commission
6 and every interested party to litigate the fundamental and extremely complex issues
7 of retail electric deregulation, now and in this proceeding. As discussed more fully
8 above, the Commission's jurisdiction is subject to no such limits or requirements.
9 The Commission is granted broad discretion to consider issues in the public interest.
10 Even in a CC&N application it is the "convenience and necessity" of the public, not
11 the individual applicant, that is at issue. If it is not effective, efficient or appropriate
12 to litigate the many issues of retail deregulation here and now then the Commission
13 may, and should, adopt the wise course of deferring this application to a later time, if
14 any, where the Commission indicates that it has resolved all of its underlying issues
15 and is prepared, in the public interest, to consider the qualifications of individual
16 applicants to provide competitive service.

17 **CONCLUSION**

18 For the reasons stated above and in its motion, New West Energy respectfully
19 requests that Sempra's application for a CC&N be dismissed without prejudice.

20 RESPECTFULLY SUBMITTED this ____ day of February, 2008.

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By: Michael Fox

EXHIBIT "A"

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION
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WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
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2002 JAN 22 P 2:39

ARIZONA CORPORATION COMMISSION
CLERK OF THE COMMISSION

IN THE MATTER OF THE GENERIC
PROCEEDINGS CONCERNING ELECTRIC
RESTRUCTURING ISSUES.

DOCKET NO. E-00000A-02-0051

PROCEDURAL ORDER

BY THE COMMISSION:

On January 14, 2002, Chairman Mundell issued a letter to Commissioners Irvin and Spitzer and to all interested parties concerning opening a forum for discussion of "developing issues in electric restructuring". Attached to the letter was a list of questions that Chairman Mundell requested parties to address with specific answers and proposals. The Chairman also invited the other Commissioners to docket their questions. Although the Chairman's letter requested that the new generic docket be consolidated with the Arizona Independent Scheduling Administrator generic docket,¹ and with the Arizona Public Service Company's Request for a Partial Variance to A.A.C. R14-2-1606(B) and for Approval of a Purchase Power Agreement,² such a decision on whether to consolidate the matters will be made at a later time. Several interested parties have contacted the Commission and Hearing Division, indicating that additional time was necessary in order to fully answer and address the list of questions. Accordingly, the time for responding to Commissioners' questions will be extended until February 25, 2002. After receipt of the filings, the Commission may set public comment hearings and/or schedule an Open Meeting.

IT IS THEREFORE ORDERED that a generic docket is hereby opened to address developing issues in electric restructuring.

IT IS FURTHER ORDERED that all interested parties shall file responses to the Commissioners' questions, no later than February 25, 2002.

¹ DOCKET NO. E-00000A-01-0630

² DOCKET NO. E-01345A-01-0822

1 IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive
2 any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

3 DATED this 22nd day of January, 2002.

4
5
6 
7 LYN FARMER
8 CHIEF ADMINISTRATIVE LAW JUDGE

9 Copies of the foregoing mailed/delivered
10 this 22nd day of January, 2002 to:

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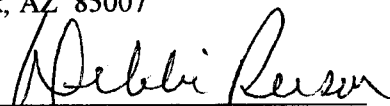
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